In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-743

ANTHONY TORTORELLO, PETITIONER

v.

UNITED STATES OF AMERICA

No. 72-766

JOSEPH CALABRO, PETITIONER

v.

UNITED STATES OF AMERICA

No. 72-5730

JOHN CONFORTI, PETITIONER

v.

UNITED STATES OF AMERICA

No. 72-5733

LEONARD CONFORTI, PETITIONER

v.

UNITED STATES OF AMERICA

No. 72-5909

ANTHONY PICCIANO, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

492-641—73——1

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a lengthy jury trial in the United States District Court for the Eastern District of New York, petitioners were variously convicted of forging and uttering United States Series E Savings Bonds and United States Postal Money Orders in violation of 18 U.S.C. 495 and of conspiring to do so in violation of 18 U.S.C. 371. They were given sentences ranging from probation to ten years' imprisonment; in addition, fines of $10,000 and $26,000 were imposed on petitioners Calabro and Leonard Conforti, respectively. The evidence upon which the convictions were based is fully summarized in the opinion of the court of appeals (Pet. App. 4a–8a;[1] 467 F. 2d 973, 978–980).

With one exception, which we shall discuss below, all of the contentions which petitioners raise here were rejected after full consideration by the court of appeals, upon whose opinion we primarily rely. Thus, Tortorello's claim (No. 72–743) that there was insufficient evidence to sustain his conviction as an aider and abettor is answered at Pet. App. 11a–12a (467 F. 2d at 982). Calabro's claim (No. 72–766) that he was convicted in violation of his Sixth Amendment right to counsel because of the absence of his attorney due to illness during part of the jury's deliberations and

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[1] "Pet. App." refers to the appendix to the Tortorello petition, No. 72–743.

when the verdict was received is answered at Pet. App. 23a–26a (467 F. 2d at 988–989).[2] John Conforti's contentions (No. 72–5730) that (1) he was prejudiced because the evidence assertedly showed multiple conspiracies rather than a single conspiracy (Pet. 9–11), that (2) the trial court admitted hearsay evidence without specifically ruling on its admissibility under the co-conspirator exception to the hearsay rule (Pet. 11–12), and (3) that there was insufficient proof of his participation in the conspiracy (Pet. 12–13), are answered at, respectively, (1) Pet. App. 12a–15a (467 F. 2d at 982–983), (2) Pet. App. 27a (467 F. 2d at 989), and (3) Pet. App. 7a–8a, 10a–11a (467 F. 2d at 979–980, 981). The contention by Picciano, *et al.* (No. 72–5909) that they were improperly denied a sever-

[2] Petitioner Calabro claims that the decision below is inconsistent with decisions of the Sixth and Tenth Circuits. (*United States* v. *Smith*, 411 F. 2d 733 (C.A. 6); *Thomas* v. *Hunter*, 153 F. 2d 834 (C.A. 10)). The court below noted that these cases are distinguishable, and correctly preferred to follow the reasoning of the Fifth Circuit in *Martin* v. *United States*, 182 F. 2d 225, certiorari denied, 340 U.S. 892, and *Kent* v. *Sanford*, 121 F. 2d 216, certiorari denied, 315 U.S. 799. The District of Columbia and the Ninth Circuit probably agree with the Fifth Circuit and the court below. See *McGill* v. *United States*, 348 F. 2d 791 (C.A. D.C.) (absence of counsel at arraignment when defendant pleads not guilty does not harm defendant; to find denial of constitutional right in such circumstances would exalt form over substance); *Newagon* v. *Swope*, 183 F. 2d 340 (C.A. 9) (voluntary absence of counsel when verdict returned does not deprive defendant of constitutional rights) and *Lovvorn* v. *Johnston*, 118 F. 2d 704 (C.A. 9) (same). To the extent there is any inconsistency, the question is of such infrequent occurrence and marginal significance that certiorari would not be warranted.

ence is answered at Pet. App. 22a–23a (467 F. 2d at 987–988).

Leonard Conforti's contention (No. 72–5733) is that he was denied his Sixth Amendment right to counsel at a post-verdict hearing on his claim that he had been promised immunity during a plea bargaining session in connection with another indictment. Conforti had dismissed his assigned attorney in the middle of the trial itself after a disagreement on tactics; the main thrust of his argument to the court of appeals was that the trial court's refusal to assign substitute counsel for the remainder of the trial constituted a Sixth Amendment violation. The court of appeals fully considered and rejected this contention, holding that Conforti waived his right to counsel by dismissing his assigned attorney without good cause (Pet. App. 15a–22a, 467 F. 2d at 983–987), and he is apparently not pursuing the claim before this Court. His subsidiary argument below regarding the post-trial hearing, upon which he places his sole reliance here, was apparently among the "numerous other points, none of which has merit" which the court of appeals also rejected (Pet. App. 27a, 467 F. 2d at 989). This holding in no way suggested that the Sixth Amendment right to counsel does not extend to proceedings collateral to trial. Rather, it constituted acceptance of the government's argument that Conforti—with full knowledge of his right to counsel—had an adequate opportunity during the nine day interval between trial and the hearing on his immunity claim either to retain an

attorney[3] or request that one be assigned to assist him at that hearing, and that he had waived his Sixth Amendment right by failing to take either step. As we pointed out in the court below, the trial court had made it quite clear that its refusal to appoint substitute counsel during trial was motivated solely by consideration of the trial delay which would inevitably have been entailed thereby in this complex, multi-party case; there was nothing in the ruling which precluded a post-trial motion for assignment of counsel when trial delay was no longer a factor.

It is therefore respectfully submitted that the petitions for writs of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

JANUARY 1973.

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[3] When Conforti dismissed his trial attorney, he first attempted to retain counsel before requesting that counsel be assigned (see Pet. App. 16a, 467 F. 2d at 984).

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